IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOSEPH R. LEDBETTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00-1153-DES
	)	
CITY OF TOPEKA, KANSAS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

This matter is before the court on the City of Topeka's ("City") Motion for Summary Judgment (Doc. 65). Plaintiff has filed a Response (Doc. 70), and the City has filed a Reply (Doc. 78).[1] Also presently pending before the court are plaintiff's Motion to Compel and Request Sanctions (Doc. 48), the City's Motion to Strike (Doc. 77), and the City's Motion for Oral Argument (Doc. 79). In this *pro se* action brought pursuant to 42 U.S.C. § 1983, plaintiff alleges the City is liable for damages arising from his unlawful arrest. For the following reasons, the City's motion for summary judgment shall be granted.

[1] In addition, plaintiff filed a supplemental response entitled "Amended Answer of Summary Judgment" (Doc. 72) and a surreply also entitled "Amended Answer of Summary Judgment" (Doc. 80). Neither pleading was filed in compliance with local rules or with leave of the court, so the court declines to consider the pleadings.

I. BACKGROUND[2]

Plaintiff was arrested on April 24, 1998, pursuant to a warrant issued by Municipal Court Judge Neil Roach. The warrant arose from plaintiff's failure to appear and answer a complaint filed regarding the proper licensing of plaintiff's canine. The warrant, however, was not personally signed by Judge Roach. Instead, the warrant was generated by computer and "signed" by a court clerk using Judge Roach's signature stamp. Kansas law requires that all municipal arrest warrants "shall be signed by the judge of the municipal court." Kan. Stat. Ann. § 12-4208. The City concedes the warrant at issue failed to comport with state law.

Plaintiff asserts his arrest was unlawful and resulted in a deprivation of his constitutional rights.

II. STANDARD OF REVIEW

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat

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[2] The court only recites those facts necessary for the current disposition. A more thorough discussion of the factual history and original parties may be found in *Ledbetter v. City of Topeka*, No. 00-1153, 2001 WL 80060 (D. Kan. Jan. 23, 2001) (granting in part multiple defendants' motion to dismiss).

an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The substantive law identifies which facts are material. *Id.* at 248. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

The movant has the initial burden of showing the absence of a genuine issue of material fact. *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993). The movant may discharge its burden "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The movant need not negate the nonmovant's claim. *Id.* at 323. Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to

interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324 (interpreting Fed. R. Civ. P. 56(e)). Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. *Id.* at 322. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. *Id.* at 323.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. *See, e.g., United States v. O'Block*, 788 F.2d 1433, 1435 (10th Cir. 1986) ("The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues."). The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. *Anderson*, 477 U.S. at 249. Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. *Id.* at 250.

III. DISCUSSION

A. 42 U.S.C. § 1983

Claims brought pursuant to § 1983 seek relief for deprivations of federally secured rights. To prevail on his § 1983 claim, plaintiff "must establish that [he was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under the color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). *See generally Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999). While § 1983 is a vehicle by which plaintiff may seek relief, the statute neither grants or creates any independent substantive rights. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (noting § 1983 is not itself a source of substantive rights, but merely provides "a method for vindicating federal rights elsewhere conferred").

Granting plaintiff's *pro se* filings a liberal construction, the court interprets plaintiff's claim as alleging a violation of his Fourth Amendment right to be free from arrest unsupported by probable cause. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

See also Beck v. Ohio, 379 U.S. 89, 91 (1964); *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996). In particular, plaintiff alleges the City is liable for Judge Roach's decision to issue an invalid arrest warrant. The City seeks summary judgment solely on the issue of municipal liability.[3]

B. Municipal Liability

Any discussion of municipal liability under § 1983 must necessarily begin with the principles established in *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) and its progeny. Under *Monell*'s teaching, it is well established that a municipality will not be liable for the actions of its employees under a theory of respondeat superior. 436 U.S. at 691. "Instead, it must be shown that the unconstitutional actions of an employee were representative of an official policy or custom of the municipal institution, or were carried out by an official with final policy making authority with respect to the challenged action." *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-83 (1986) (plurality opinion);

[3] Although the court raised the question of whether independent probable cause could justify plaintiff's arrest in its previous order, *Ledbetter*, 2001 WL 80060 at *3, the City's instant motion fails to discuss the matter.

Murrell v. School Dist. No. 1, 186 F.3d 1238, 1248-49 (10th Cir. 1999)).

Furthermore, in *City of St. Louis v. Praprotnik*, the Supreme Court summarized the boundaries of municipal liability under § 1983:

> First, . . . municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, that is, acts which the municipality has officially sanctioned or ordered. Second, only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability. Third, whether a particular official has final policymaking authority is a question of *state law*. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the City's business.

485 U.S. 112, 123 (1988) (internal citation and quotation marks omitted) (emphasis in original). *See also Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 592 (10th Cir. 1999) (noting that to subject a municipality to § 1983 liability for an employee's acts done pursuant to a municipal policy, a plaintiff must demonstrate "(1) the existence of a custom or policy and (2) a direct causal link between the custom or policy and the violation alleged").

At the outset, plaintiff makes the assumption that because Judge Roach is an employee of the City his act necessarily imputes liability to the City. Under *Monell*, however, the status of Judge

Roach's employment is not determinative, for even assuming his actions led to plaintiff's constitutional deprivation, the City will not be liable based solely on Judge Roach's position as employee.

As noted above, however, if Judge Roach acted pursuant to a municipal policy or with final policymaking authority, then the City may bear liability for his actions. The court will first address whether Judge Roach was a municipal policymaker. It is within this question that the nature of the relationship between municipality and municipal judge becomes critical. The City asserts Judge Roach was not a policymaker for the City of Topeka, and in the converse, the City further asserts it did not set policy for the municipal court or Judge Roach.

1. Municipal Policymaker

As a starting point, the court finds Judge Roach to be a municipal official. *See* Kan. Stat. Ann. § 12-4105 (municipal judge's salary to be set by city); *Id.* § 13-527 (municipal judge to be appointed by city mayor with consent of city counsel); *In re Handy*, 867 P.2d 341, 345 (Kan. 1994) (observing municipal judge is an employee of municipality). However, the court also recognizes that Judge Roach is a state judicial officer endeared with the state's judicial authority and power. *See* Kan. Const. art. III, §

1 ("The judicial power of the state shall be vested exclusively in one Court of justice, which shall be divided into one supreme court, district courts, and *such other courts as provided by law* . . . .") (emphasis added); *State v. Delacruz*, 899 P.2d 1042, 1047 (Kan. 1995) ("[M]unicipal judges in Kansas are trained and tested by the Kansas Supreme Court in its supervisory responsibilities over the Kansas Judicial Branch of government."); *Holland v. Lutz*, 401 P.2d 1015, 1019 (Kan. 1965) ("The rules granting immunity to judicial officers for official acts performed within the scope of their jurisdictions generally apply, not only to judges of courts of general jurisdiction, but to those of limited jurisdiction as well, including city magistrates.").[4]

As a municipal judge, therefore, Judge Roach wore two "hats" and acted on behalf of both the City and the State of Kansas. As a foundational issue, the court must determine if Judge Roach's act of issuing the invalid warrant was done pursuant to his municipal or state authority. In a similar case, the Ninth Circuit considered whether a municipality could be held liable under § 1983 for a municipal judge's failure to properly inform an indigent defendant

[4] The court previously recognized Judge Roach's status as a judicial officer of the state by dismissing him from this case pursuant to the doctrine of judicial immunity. *Ledbetter*, 2001 WL 80060 at *3.

of his right to counsel. *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994). In asserting municipal liability, the plaintiff in *Eggar* argued the municipal judge was acting on behalf of the municipality because the act of advising defendants of their rights was more akin to an administrative or ministerial act than an exercise of judicial discretion. *Id.* at 315. The Ninth Circuit rejected the argument by finding "state law makes clear, the Judge's obligation to address the rights of defendants arises from his membership in the state judiciary." *Id.*

In the present case, the judicial authority wielded by Kansas municipal judges is governed by the Kansas Code of Procedure for Municipal Courts. Kan. Stat. Ann. § 12-4101 *et. seq.* A municipal judge's duty to sign all municipal arrest warrants is directly mandated by statute. Kan. Stat. Ann. § 12-4208 ("A warrant . . . shall be signed by the judge of the municipal court . . . ."). Judge Roach's failure to follow state law, therefore, represented not an administrative failure reflecting upon his municipal identity, but, rather, Judge Roach's failure represented a dereliction of his state law derived judicial duties. As noted by the Kansas Supreme Court in *Delacruz*, it befalls Kansas's highest court to discipline, instruct, and supervise municipal judges

exercising their judicial authority. 899 P.2d at 1047. *See, e.g., In re Handy*, 867 P.2d at 345 (judicial disciplinary action involving a judge holding both municipal and district court authority). There is simply no evidence before the court indicating the City had the power or authority to intervene in Judge Roach's execution of state law. On the other hand, state law indicates a municipal judge's decisions are appealable to the state district courts, Kan. Stat. Ann. § 12-4601, so reinforcing Judge Roach's position within the framework of the Kansas judiciary.

As a source of comparison, in *Crane v. Texas*, the Fifth Circuit found a county liable for the ongoing practice of the county attorney in obtaining warrants without going before a magistrate, even though the county had no legal authority over the attorney. 759 F.2d 412 (5th Cir. 1985). As distinguished from the case at bar, the record in *Crane* revealed that the county attorney was solely responsible for setting the county's system of issuing warrants. 759 F.2d at 429. As the Fifth Circuit noted:

> [The county attorney's] authority to establish County procedures for issuing misdemeanor capias derived from the County office to which he was elected by County voters. . . . . Thus, because the ultimate authority for determining County capias procedures reposed in the [county attorney], an elected County official, his decisions in that regard must be considered official policy attributable to the County.

Id. at 429-30.

Likewise, in *Familias Unidas v. Briscoe*, the Fifth Circuit found that the acts of a county judge could constitute county policy when the judge holds absolute power over the contested matter. 619 F.2d 391, 404 (5th Cir. 1980) ("at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must . . . fairly be said to represent official policy").

In the present context, Judge Roach's authority to issue arrest warrants was circumscribed by his judicial duty to follow state law. Any procedural "trailblazing" on his part was not done under the auspices of the City and could not be interpreted as promulgating municipal policy. A municipality will bear liability for an official's act only if the official possessed "final authority to establish policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481.

In sum, the issuance of plaintiff's invalid arrest warrant by Judge Roach was done pursuant to his position as a judicial officer of the State of Kansas. Conversely, Judge Roach was not acting with final policymaking authority for the City. In this context, state law, not any alleged delegation of authority to Judge Roach,

established policy for the issuance of municipal arrest warrants.[5] As the Ninth Circuit noted: "A municipality cannot be liable for judicial conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality." *Eggar*, 40 F.3d at 316.

2. The City's Policy or Custom

Plaintiff alleges the City maintained a widespread practice of arresting its citizens on invalid municipal arrest warrants, and, with citation to *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984), plaintiff claims this widespread practice constituted a *municipal* custom.[6] (Pl. Resp. to Mot. for Summ. J. at 8). Unfortunately, the above analysis precludes plaintiff's argument. Once again, because Judge Roach was operating as a judicial officer,

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[5] The court would note that under the "home rule" provisions of the Kansas Constitution, the Kansas Supreme Court has held that Kansas municipalities can, by charter ordinance, alter or choose not to apply the Kansas Code of Procedure for Municipal Courts. *City of Junction City v. Griffin*, 607 P.2d 459 (Kan. 1980). It is uncontested, however, that on the date plaintiff's arrest warrant was issued, the City had not passed such an ordinance. Therefore, during all times relevant to this matter, Judge Roach was bound to tailor his actions in conformance with the state code.

[6] As the Tenth Circuit has made clear, an unconstitutional policy or custom need not be formal or written to create municipal liability. *Watson v. City of Kansas City*, 857 F.2d 690, 695 (10th Cir. 1988). Instead, a municipality may be held liable for an illegal practice if the practice "is so permanent and well settled as to constitute a custom or usage with the force of law." *Cannon v. City & County of Denver*, 998 F.2d 867, 877 (10th Cir. 1993) (internal citation and quotation marks omitted).

his failure in following state law could not be considered a policy or custom of the City. *Eggar*, 40 F.3d at 316 ("Because [Municipal] Judge Travis was functioning as a state judicial officer, his acts and omissions were not part of a city policy or custom."). This finding is not shaken regardless of how many times Judge Roach may have departed from his duty to sign all municipal arrest warrants.

In any event, plaintiff's only evidence of this custom is contained in his personal affidavit, which the City argues relies solely on inadmissible hearsay. (Def. Mot. to Strike at 1). After review, the court concurs. It is well established that inadmissible hearsay embedded within an affidavit may not be considered by the court within summary judgment proceedings. *Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Plaintiff argues the statements contained in his affidavit are not hearsay because they are merely summaries of his personal interviews of two potential witnesses.[7] Unfortunately for

[7] In its totality, plaintiff's response states:

> There is not inadmissible hearsay in my personal affidavit; paragraphs 9, an [sic] 10 are based on personal knowledge and interviews I conducted with the Court (Bailiff) Police officer, and the former Court warrants officer Patti Hundertfund whose husband still works for City of Topeka P.D. I see why you would like them out, but they will be witnesses at trial. Stop trying to cover up your sins-confession is good for the soul-who knows, God may even show mercy on you for finally coming clean.

plaintiff, this type of "preview" affidavit was specifically found to be inappropriate in *Thomas.* 48 F.3d at 485 ("hearsay testimony that would be inadmissible at trial may not be included in an affidavit to defeat summary judgment because a third party's description of a witness' supposed testimony is not suitable grist for the summary judgment mill") (internal citation and quotation marks omitted). The court will grant the City's motion to strike.[8]

C. Motion to Compel and Request for Sanctions

The court summarily denies plaintiff's motion for its failure to comport with local rules. Kan. D. Rule 37.1, 37.2. The court, however, denies the City's request for attorney's fees.

IV. CONCLUSION

The court grants summary judgment on plaintiff's § 1983 claim. Plaintiff is unable to demonstrate any policy or custom attributable to the City, which was responsible for his constitutional deprivation. In addition, the court finds Judge Roach's actions in this matter were not undertaken with final municipal policymaking authority.

(Pl. Resp. to Mot. to Strike at 1).

[8] Although unraised by plaintiff, the court finds Rule 801(d)(2)(D) of the Federal Rules of Evidence inapplicable to the statements contained within plaintiff's affidavit.

IT IS THEREFORE BY THIS COURT ORDERED that the City of Topeka's Motion for Summary Judgment (Doc. 65) is granted, the City of Topeka's Motion to Strike (Doc. 77) is granted, but the City of Topeka's Motion for Oral Argument (Doc. 79) is denied as moot.

IT IS FURTHER BY THIS COURT ORDERED that plaintiff's Motion to Compel and Request Sanctions (Doc. 48) is denied.

Dated this _____ day of January, 2002, at Topeka, Kansas.

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DALE E. SAFFELS
United States District Judge

DES:MSC